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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

TURNER GLASS CORPORATION, *Petitioner*, *vs.* HARTFORD-EMPIRE COMPANY, *et al.*, *Respondents.*	No. 831

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF THE CASE

This damage action is based on violations of the anti-trust laws considered by this Court in *Hartford-Empire* v. *U. S.*, 323 U. S. 386, 324 U. S. 570, 46 F. Supp. 541 (the "*Toledo* case"). As hereinafter shown, there is nothing in any of the opinions in that case supporting petitioner's claim of injury resulting from any such violation.

PROCEEDINGS BELOW

This case was tried before a Special Master. An extensive hearing resulted in a record of more than 13,000 pages, including more than 2,000 typewritten pages of oral testimony and more than 1,200 exhibits. Respondents rested at the close of petitioner's evidence. However, 75% of the oral testimony consisted of cross-examination and 353 exhibits were introduced as a part thereof.

The Master made a detailed finding of facts, 195 printed pages in length (R. 374 to 568). His conclusion was that while respondents, other than Stevenson Corporation* and Hazel-Atlas Glass Company,** as found in the *Toledo* case, had been engaged in a conspiracy to violate the anti-trust laws for several years prior to the receivership of petitioner and the resulting sale of its property, the latter had failed to establish that it sustained any injury as a result.

The District Court overruled objections to the Master's Report, made a finding of facts, 95 pages in length (R. 570 to 665) and entered judgment for respondents.

In the Court of Appeals petitioner requested a waiver of Rule 14 requiring printing of the record. Upon denial of the request, it filed a petition for such a waiver with respect to a greatly reduced record and at the same time requested permission to amend its Statement of Points so as to present only what it asserted to be three questions of law (R. 2100).

The shortened record in the Court of Appeals, which has been filed in this Court, together with a typewritten manuscript containing the proceedings in the Court of Appeals, omits all of the oral testimony and all but 38 of the exhibits, including all of respondents' exhibits. Petitioner has also filed a motion in this Court to waive the requirements of paragraph 7 of Rule 38 with respect to printing the record.

The Court of Appeals properly held that upon such a record no question with respect to the sufficiency of the

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*Stevenson Corporation was granted a summary judgment in the *Toledo* case. No evidence was offered against it here. No further reference will be made to it.

**It was found at Toledo and here that Hazel-Atlas did not join the conspiracy until July 1, 1932, a year and one-half after the appointment of a receiver for petitioner (R. 563, 661).

evidence to sustain the findings was presented and that such findings must be accepted as correct (Pet. Br., p. 43). This principle, as hereinafter shown, precludes consideration of some of the questions petitioner now attempts to present.

The scope of the Court of Appeals opinion was further narrowed by reason of a concession made by counsel for the petitioner during the argument. That court said:

> "* * * upon oral argument its counsel stated that if the license agreements are legal, plaintiff 'is out'. We take this to mean that, in the event we hold that the agreements are not inherently illegal, the judgment must be affirmed. Accordingly we address ourselves only to that contention" (Pet. Br., p. 44).

In its petition and brief, here, notwithstanding its specific concession, petitioner has again presented the three questions specified in its amended statement of points, together with an additional question not even presented to the Court of Appeals (*Infra*, p. 35).

The factual statements contained in the petition and brief are far from complete, and in view of the scope of some of petitioner's contentions a more comprehensive statement is required. All of the statements which follow appear in the findings. Most of them are stated in the opinion of the Court of Appeals (Pet. Br. pp. 40-42).

HISTORY OF PETITIONER

Petitioner was formerly engaged in the manufacture of glass containers in Indiana. Prior to 1920 it manufactured whiskey and beer bottles, originally by hand, and later by the use of semi-automatic equipment. This business was

entirely destroyed by the advent of national prohibition. Petitioner was faced with the alternative of closing its doors or establishing an entirely new business in other fields of ware. In 1920 it became a licensee of Howard Automatic Glass Machine Company and thus obtained a few automatic feeders. In 1922 Hartford acquired the Howard patents and feeders and in 1923 entered into new license agreements with petitioner (Fdg. 24, R. 595). There is no finding that petitioner was forced to enter into these agreements. The District Court found that the use of Howard feeders did not produce satisfactory results until petitioner obtained Hartford's service therefor (Fdg. 22, R. 595).

There is no finding as to earnings of petitioner prior to 1921. In that year it had only nominal earnings and in 1922 it suffered a large operating loss (Fdg. 23, R. 595). At the time it became a Hartford licensee in 1923, its officers and stockholders were considering closing the plant because of unsatisfactory operating results. In that year Hartford was requested to and did extend credit to petitioner for new modern equipment needed to increase its plant efficiency and production (Fdgs. 24, 25, R. 595-6).

As a result of becoming a Hartford licensee, petitioner, during the remainder of its business life, received the benefit which resulted from Hartford's servicing of the machines, and was at all times thereafter in a position to obtain Hartford's latest and most improved equipment (Fdg. 24, R. 595). Substantial quantities of such new equipment were obtained (R. 1033 to 1036). More favorable results followed.

In 1924 petitioner had a net profit of $109,000 and thereafter until the end of the third quarter of 1929 had net

earnings averaging more than $150,000 per year as against its prior losses (M. Fdgs. 25, 26, 27, 29, 31, 33, R. 597, 600, 608, 621, 628). In the first three quarters of 1929 it had earnings of $229,000, which was in excess of any prior full year. The entire glass industry, however, was adversely affected by the severe business depression, which became apparent during the summer of that year. Prices declined. Manufacturers began to curtail inventories and production. Competition became harder to meet. Petitioner decided that it needed more improved Hartford equipment to speed up and increase production and reduce its overhead costs. It acquired additional feeders and annealing lehrs, in the expectation of obtaining increased volume by concentrating on low-priced ware (Fdg. 33, R. 626). It entered into two year contracts with Great Atlantic & Pacific Tea Co. and Gold Dust Corp. for large quantities of ware at prices which proved to be below cost of production (Fdg. 33, R. 627).

Commencing with the approximate date of the stock market crash, petitioner began to suffer substantial and steadily increasing losses. For the fourth quarter of 1929 it lost $100,000 (Fdg. 33, R. 628) and losses continued throughout 1930. In June and July of that year it was forced to secure $400,000 of bank loans by a pledge of $250,000 of receivables, warehouse receipts for finished inventory of $140,000 and a minimum cash balance of $50,000 (Fdg. 34, R. 629-31).

The result was disastrous to petitioner. The bank transaction became known to its principal customers and destroyed their confidence in its ability to continue in business. By August of 1930 it was obvious that it could not go on without refinancing. It was unsuccessful in its attempts to

effect a merger or to sell its property. It sought help from Hartford, which paid for an audit of petitioner and was ready to advance money if a satisfactory reorganization could be effected. Hartford had given petitioner credit to the end of 1930 on its indebtedness for new equipment, and pending the reorganization efforts permitted arrearages of its entire royalties after the month of June until the appointment of a receiver in December (Fdg. 34, R. 632-41). A principal obstacle to refinancing was the refusal of A & P and Gold Dust to agree to any price increases (Fdg. 34, R. 635, 651).

After a long series of negotiations, detailed in the findings, a meeting of representatives of Hartford, Turner, the banks and the bondholders was held on December 27, 1930. All present agreed that the appointment of a receiver was unavoidable. The proceeding was immediately commenced (in the same court which heard this case) by Hartford as a creditor and a hearing was held on the same day at the joint request of counsel for Hartford and petitioner. Both petitioner's counsel and its president stated in open court that no course other than a receivership was possible (Fdg. 34, R. 644-50). The District Court found that such appointment prevented an unnecessary waste and dissipation of petitioner's property and assets and thereby benefited its general creditors. It further found that petitioner could not have continued even if no receiver had been appointed (Fdg. 34, R. 650-1).

The receiver was unable to operate and at once began to arrange for a sale of the properties. Respondent Thatcher held a $50,000 note and $500,000 second preferred stock as the result of an earlier sale of a plant to petitioner. Collins of Hocking Glass (later Anchor Hocking) and associates held a substantial minority of the common stock

of petitioner. To protect their investments, Thatcher and Hocking joined in bidding in the properties at a public sale, subject to a large bond issue and taxes, and organized General Glass Corporation, which operated one of the Turner plants (Fdg. 35, R. 651). Petitioner's statement (pp. 2, 5) that Hartford participated in forming General is erroneous (R. 536).

It may be noted in passing that the appraisal of the Turner properties to which petitioner refers, both in the petition and brief, was made as of August 5, 1927, more than three years before the receivership, for the purpose of interesting investment bankers and underwriters in the purchase of a proposed bond issue (M. Fdg. 32, R. 437).

In considering petitioner's various claims of damage, it should be borne in mind that it began its connection with respondents as a failing business about to close its doors; that in a period of about six years, due in a large measure to assistance by Hartford, it was transformed into a relatively prosperous business; and that while it failed, as did thousands of other concerns, to survive the economic crisis of late 1929 and the early thirties, the Master and the District Court upon a consideration of all of the evidence absolved the respondents of any responsibility therefor (M. Fdgs. 37, 38, 43, R. 533, 539, 567; Ct. Fdgs. 34, 35, 39, R. 651, 655, 663). Since only a small part of the evidence is in the record filed in this Court, no question with respect to such findings is presented for review.

CLAIMS ASSERTED IN COMPLAINT AND EFFECT OF TOLEDO DECISION

This cause was commenced in 1942, ten years after the discharge of the receiver and only a few months before the

decision of the District Court in the *Toledo* case. Originally the claim was that petitioner had sustained certain specific losses in consequence of the conspiracy established in the *Toledo* case (R. 2-62). The complaint alleged a conspiracy substantially in the language of the Toledo complaint, and charged that in pursuance thereof, respondents had caused petitioner to part with certain of its properties for less than their real value, and later, after failing to obtain its cooperation in stabilizing the industry, had caused it to take business below cost and forced it out of business by means of the receivership and ensuing sale of its properties to Thatcher and Hocking. Respondents were charged with having brought about such result chiefly through the aid of I. J. Collins and L. B. Williams, who had become stockholders, directors, and members of the executive committee of petitioner as a result of its acquisition of Monongah Glass Company, and their associate Fulton, also a director of Turner. (R. 49-56)

No right to recover royalties and license fees was asserted.

Collins, Williams, and Fulton were defendants in the *Toledo* case, as was Anchor Hocking Glass Corporation, the successor to Hocking Glass Company and General Glass Company, the purchaser at the receiver's sale. However, the District Court in the *Toledo* case dismissed Williams and Anchor Hocking and refused certain proposed findings of fact tendered by the Government which sought to connect many of the transactions complained of by petitioner with the conspiracy there found to exist.

The findings so tendered and refused appear in the record in this Court in *Hartford-Empire Co. et al.* v. *U. S.*, 323 U. S. 386, at pp. 7038 to 7041, and in the Master's Finding 40 at pp. 564 to 566 in this record.

While Collins and Fulton were retained as defendants by the Toledo District Court, this action was unanimously reversed by this Court despite the attempt of the Government to sustain it, largely by urging the evidence as to the Turner transactions. In reversing as to Fulton, and two other associates, this Court said:

> "We think the decree against them must be reversed for want of allegations in the bill sufficient to support a decree against them; because the findings made do not support the decree as to them; *because the refusal of findings requested by the Government exculpates them of participation in the conspiracy; and, finally, because the proofs fail to connect them with it*"* (323 U. S. 403).

And in dismissing as to Collins, this Court referred to the above statement and said:

> "* * * As in the case of the other appellants mentioned [Fulton, et al], the Government requested findings of fact which, if made, would have spelled out a connection between Collins and the other conspirators but these were refused by the judge. * * *" (323 U. S. 405).

The result of this action, of course, was to leave the petitioner with the burden of sustaining the charges based upon alleged activities of Collins, Williams, and Fulton without assistance from the Toledo judgment. This burden, as found by the Master and the District Court, it was wholly unable to discharge.

Since all of the charges of responsibility for the losses which resulted in petitioner's liquidation were found by the

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*All emphasis supplied unless otherwise indicated.

Master and District Court to be wholly groundless, petitioner presented in the Circuit Court of Appeals as its principal contention, that it is entitled to recover as damages treble the amounts it paid for the use of Hartford's machines, patents and services. The fundamental question is whether the finding of the District Court that the evidence failed to establish any injury to petitioner is erroneous. The question of whether proof of the payment of license fees and royalties established injury, as well as the other claims of petitioner with respect to injury, are discussed in the Argument which follows.

II.

ARGUMENT

A. Recovery of License Fees and Royalties Was Properly Denied.

1. Analysis of Petitioner's Contention

The net effect of the recovery of royalties and license fees sought by petitioner would be to give it the use of Hartford's equipment and services for a period of seven years free of charge, and to award it an additional recovery of double the amount paid because the equipment and services were not furnished free of charge in the first instance.

Obviously such a recovery would bear no relation to any damage sustained by petitioner. It does not contend and obviously could not contend, that except for its agreements with Hartford it could have obtained equipment and engineering services without cost. Moreover, the recovery

sought is in no way connected with petitioner's failure and liquidation.

Any principle which would support a recovery for petitioner would likewise sustain a recovery by all other Hartford licensees however prosperous. Indeed, the greater the volume of business of the licensee the greater would be the damage sustained, if the contention is tenable. A theory which would produce such an anomalous result is at least suspect from the start.

The claim that petitioner was improperly denied the right to recover, as damages sustained by violations of the anti-trust laws, all royalties and license fees paid as a licensee of respondent Hartford is built upon the following assumptions:

(a) That its license agreements were illegal because violative of the anti-trust laws, either because of their provisions, or because they were integral parts of an illegal scheme.

(b) That because of such illegality they would not have been enforced by the courts.

(c) That payments made under agreements which would not be enforced by the courts, if challenged, are illegally exacted and may be recovered threefold as damages sustained from anti-trust law violation.

Respondents' position is that the license agreements were not inherently illegal and were enforceable between the parties; and that even if they had been unenforceable because of illegality, amounts paid thereunder could not, under fundamental principles, be recovered as damages suffered in consequence of violation of the anti-trust laws.

It is clear that what petitioner actually seeks to recover is not in any sense damages sustained from violation of the anti-trust laws, but profits which it insists it could have realized by refusing payment for benefits received, although obviously Hartford in no event could have been required to continue to supply equipment and services for which petitioner refused to pay. It urges that to permit such a recovery would be of great public importance as a deterrent to violators and would thus aid in the enforcement of the anti-trust laws. But as stated in *Clark Oil Co.* v. *Phillips Petroleum Co., et al.,* 148 F. (2d) 580, 582, (8th Cir. 1945) cert. den. 326 U. S. 734:

> "* * * The Sherman Act and the Clayton Act afford a cause of action for those suffering damages. In their provisions for damages they embody both punitive and compensatory damages *but no recovery can be had unless a case for compensatory damages is made.* * * *"

The Special Master, the District Court, and the Court of Appeals have held that no such case has been made on the facts found.

Petitioner cannot avoid the necessity of establishing a case for compensatory damages by an appeal for judicial enlargement of the statutory remedy as an aid in the enforcement of the anti-trust laws. A similar appeal was rejected by this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 750.

2. The Contention That the License Agreements Were Inherently Illegal.

Petitioner's contention that the license agreements here involved were illegal is founded primarily upon the claim

that they were so adjudged by the District Court and by this Court in the *Toledo* case. The Court of Appeals in in this case held that no issue as to the *inherent* illegality of the license agreements was involved or decided in the *Toledo* case; that the provisions of such agreements did not render them inherently illegal; and that under the decisions of this Court only *inherent* illegality renders agreements unenforceable (Pet. Br., pp. 45-47). Since this holding destroyed the premise which petitioner had conceded was indispensable to its contention that its payments were illegally exacted (*supra*, p. 3), that Court was not required to, and did not, decide whether payments made, even under unenforceable agreements, for benefits received and retained, can be recovered as damages under Sec. 15, Title 15 U. S. C.

An examination of the *Toledo* record, including the opinions of this Court in the light of the issues in that case, clearly sustains the conclusion of the Court of Appeals that no question of the inherent illegality of the individual license agreements was presented or decided. That case did not involve any question of the enforceability of such agreements. The Government was entitled to relief in that action if it established that the defendants or some of them were engaged in a conspiracy to violate the anti-trust laws, and was entitled to relief with respect to the Hartford licensing system if that system was found to have been used as a means of violating such laws without respect to the legality of the provisions of the individual agreements.

Whether the individual license provisions were inherently legal or illegal was immaterial. This is well illustrated by a consideration of *Wilder Mfg. Co.* v. *Corn Products Co.*, (1915) 236 U. S. 165 and *U. S.* v. *Corn Products Co.*, (D. C. S. D. N. Y. 1916) 234 Fed. 964, 979. In the

former case the issue was whether the plaintiff was entitled to recover for goods sold to the defendant. The defendant contended that plaintiff was engaged in an illegal conspiracy to violate the anti-trust laws; that certain restrictions in its contract were inserted as a means of carrying out the objectives of the conspiracy; and that the agreement was consequently illegal and unenforceable. This Court, distinguishing *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227, relied on by petitioner here, held that the illegality claimed was collateral and not inherent and that collateral illegality was not a defense.

In the second case, which was a Government action for injunctive relief with respect to the same agreements, Judge Learned Hand said:

> "* * * That such a contract was not inherently illegal is undoubtedly the fact, for it was so expressly decided by the Supreme Court in the case of *Wilder Manufacturing Co.* v. *Corn Products Refining Co.*, 236 U. S. 165, 35 Sup. Ct. 398, 59 L. Ed. 520, Ann. Cas. 1916 A. 118. But there is no warrant in the opinion for supposing that it was a permissible method of trade when a part of a general scheme of monopolization. That is the question which this case presents." (p. 979)

Similarly this Court in *U. S.* v. *U. S. Gypsum Co.*, 333 U. S. 364, 401, holding invalid a system of patent licensing found to have been entered into for the purpose of organizing an industry and stabilizing prices, said:

> "* * * That conclusion follows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful when taken in concert. * * *"

The fact that the future inclusion of restrictive provisions in license agreements was enjoined in the *Toledo* case is likewise of no significance on the question of whether inherent illegality was an issue in that case. As this Court said in *U. S.* v. *Bausch & Lomb Co.*, 321 U. S. 707, 724:

> "* * * Equity has power to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole. * * *"

General language used in the *Toledo* conclusions of law must of course be read in the light of the issues there involved, but it is clear in any event that each reference of the District Court in that case to the legality of such agreements is with respect to the system as a whole under the conditions which were found to exist. In the course of his opinion, Judge Kloeb said:

> "* * * The court realizes that a license and lease system may be perfectly legal and just if properly used. However, in the instant case, there has been a deliberate abuse and misuse of that system; and the court believes that there will be further abuses in the future as long as there is a semblance of that system remaining. It is the opinion of the court that this entire system must be abolished" (46 F. Supp. 541, at 621).

At page 24 of its brief petitioner sets out various provisions of its license agreements. (A stipulated summary of the various license provisions appears in Finding 39 in the report of the Master, R. 540-49). The only such provisions of the general character referred to in the Toledo District Court findings and conclusions are those restricting the fields of permitted ware. But apart from the use

of such provisions in the licensing system as a whole for the purpose of controlling the industry as found in the *Toledo* case, such limitations on the use of leased machinery have never been condemned but have always been recognized as within the normal prerogative of a patentee. Cf. *General Talking Pictures* v. *Western Electric Co.*, 305 U. S. 124, 127; *Hazeltine Research* v. *Automtaic Radio Mfg. Co.*, 77 F. Supp. 493, 497 (D. C. Mass. 1948).

The inclusion of such otherwise lawful provisions even for the purpose of furthering unlawful control of the industry, no more rendered the agreements inherently illegal than did the inclusion of the provisions complained of in *Wilder Manufacturing Company* v. *Corn Products Co.*, 236 U. S. 165. In *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, this Court said:

> "* * * If, in order to prove his own case, a plaintiff proves his violation of law, then no court will aid the plaintiff to recover. Here, however, what the plaintiff must show is the notes which import consideration. If consideration is denied, he can prove that cans were sold and delivered at a stated price. That is no violation of law. *It is only when the Court goes outside of the dealings between plaintiff and defendant and it is proved that the same kind of cans were sold to others at different prices within a relevant period of time, amounting to a discrimination—a fact unnecessary to sustain the plaintiff's cause of action—that the basis of the defense asserted here appears.* The Court does not give its approval to transactions betweeen one of the litigants and a third party just because it holds them irrelevant in this litigation" (p. 756).

The foregoing considerations would have been squarely applicable to an action brought by Hartford to collect license

fees and royalties from petitioner. Hartford could have established its claim by introducing in evidence its contracts, and proving that petitioner had in fact received the leased machinery (as to license fees), and had produced the quantities of ware claimed (as to production royalties). Illegality on account of the use of the licensing system could only have been established by going outside of the dealings between Hartford and petitioner and proving Hartford's relations and agreements with third persons. Illegality so required to be established is of necessity collateral.

The contention that inherent illegality of petitioner's license agreements was decided by this Court in the *Toledo* case is unfounded. Other authorities cited by petitioner obviously have no bearing on that issue. The decision of the Court of Appeals that petitioner's license agreements were not inherently illegal is not in conflict with any applicable decision of this Court but is in full accord therewith.

3. Collateral Illegality by Reason of Anti-Trust Law Violations Does Not Prevent the Enforcement of Contract Obligations.

That collateral illegality on account of anti-trust law violation is not a defense to an action to enforce contract liability is settled by the decisions of this Court culminating in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743. Earlier decisions were *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165; and *Small* v. *Lamborn*, 267 U. S. 248, 252.

Continental Wall Paper Co. v. *Voight*, 212 U. S. 227, relied on by petitioner, was distinguished in *Wilder Mfg.*

Co. v. *Corn Products Co., supra* and *Bruce's Juices* v. *American Can Co., supra* on grounds which make it clearly inapplicable here. The Court of Appeals very properly followed the holding of this Court in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 755:

> "* * * This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute [Sherman Anti-Trust Act.] * * * But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit * * *."

Its decision with respect to the effect of collateral illegality is clearly not in conflict with but follows the applicable decisions of this Court.

4. Illegal Exaction Is Not a Basis for the Recovery of Damages for Anti-Trust Law Violations.

Since the Court of Appeals held that the license agreements were not inherently illegal and that Hartford could have enforced them against petitioner, it found it unnecessary to consider or decide the further question of whether payments made under an agreement inherently illegal under the anti-trust laws, for benefits received and retained, can be recovered as damages. Petitioner assumes that such a

result would follow a determination of inherent illegality but neither authority nor sound principle supports such an assumption.

Stripped of the verbiage with which it has been surrounded, petitioner's actual ground of complaint is that by paying what it agreed to pay for a consideration received and retained, it lost the opportunity to resist an action for collection thereof on the ground that its agreements with Hartford violated the anti-trust laws and thereby obtain a windfall at Hartford's expense.

Its complaint is not that it paid too much for what it received, but that it paid at all. There is no factual basis on which a contention could be made that Hartford's rates were excessive. Not only is there no such finding in this case, but there was none in the Toledo case. This Court there said:

> "* * * It is to be borne in mind that the Government has not, in this litigation, * * * attacked, as excessive or unreasonable, the standard royalties heretofore exacted by Hartford * * *" (323 U. S. 386, 414).

It should also be noted that petitioner has no basis for any claim that it suffered damage by reason of the limitation of its fields of ware which it contends made its agreements illegal. It does not assert and the record would not support the assertion if made that it was ever denied the right to enter any field of ware which it was actually prepared or even desired to enter. Cf. *Triangle Conduit & Cable Co.* v. *National El. Prod. Corp.*, 152 F. (2d) 398 (3rd Cir. 1945).

Petitioner could claim that it was actually damaged to the extent of the payments made only by showing that,

except for its agreements with Hartford, it could have obtained the same benefits at no cost. Of course no such suggestion is made. Loss of the opportunity to assert illegality as a defense and the consequent loss of a windfall cannot constitute legal injury within the meaning of the anti-trust laws entitling petitioner to recover as damages treble the amount paid.

Where an agreement is inherently illegal, recovery is denied not because of any concern for the defendant or any recognition of merit in his position, but solely on account of the public interest because of which the courts decline to enforce such a contract at the behest of either party. *McMullen* v. *Hoffman,* 174 U. S. 639, 669; *Continental Wall Paper* v. *Voight,* 212 U. S. 227, 262; *Twin City Pipe Line Co.* v. *Harding Glass Co.,* 283 U. S. 353. The underlying basis of the holding in *Morton Salt Co.* v. *Suppiger,* 314 U. S. 488, is likewise the protection of public interest by denial of the aid of the court in vindication of private rights where the public might be adversely affected.

Private individuals frequently become the incidental beneficiaries of the foregoing principles of public policy, but they have no property right in their application of which they are deprived by voluntary payment. Thus, as stated in *12 Am. Jur.* at page 725, "the general rule is that neither party to an [illegal] agreement that has been executed on both sides will be aided in recovering what he has parted with under the agreement."

The claim of illegal exaction is wholly irrelevant to the issue of injury to property or business for which alone damages can be awarded under the anti-trust laws, and has been uniformly denied as a basis for such recovery. In *Clark Oil Co.* v. *Phillips Petroleum Co.,* 148 F. (2d) 580 (8th

Cir. 1945) cert. den. 326 U. S. 734, a gasoline dealer sought to recover from an oil company, found in a previous case to have been engaged in a conspiracy violative of the anti-trust laws to increase the price of gasoline, for the amount of the increase in the wholesale price, without proving any loss sustained because of such increase, on the theory that the amount paid constituted an illegal exaction. The Court said:

> "Plaintiffs are seeking, not compensation for damages suffered by defendants' illegal acts, but profits because of said acts. * * *
>
> "* * * Right of recovery under the Clayton Act, however, is dependent upon pecuniary loss or damage. In the excess freight rate cases plaintiff may recover the excess over the tariff rate, *not as damages* but as *overcharges*. * * *
>
> "* * * As the action to recover treble damages is not for the amount of the overcharge exacted, the 'illegal exaction theory' of the freight rate cases is not applicable. (pp. 582-3)"

Accord: *Northwestern Oil Co.* v. *Socony-Vacuum Oil Co.*, 138 F. (2d) 967 (7th Cir. 1943).

As previously pointed out, the result of a recovery here would likewise be not to compensate petitioner for damages sustained from violation of the anti-trust laws, but to confer on it a profit by reason of such violation. This is particularly true where, as the Court of Appeals noted, the *Toledo* case found that "the Hartford royalties have been passed on to the ultimate consumer" (Pet. Br. p. 43). There is no finding to the contrary here. *Cf. Twin Ports Oil Co.* v. *Pure Oil Co.*, 119 F. (2) 747, 751 (8th Cir.) cert. den. 314 U. S. 644.

The right to recover as damages amounts paid for license fees or royalties under license agreements held to violate the anti-trust laws has been denied in the only other reported case in which it has been presented. In *Alden-Rochelle, Inc. et al.* v. *American Soc. of Composers, Authors and Publishers,* (S. D. N. Y. 1948), 80 F. Supp. 888, certain motion picture exhibitors sought to recover, as damages sustained from violation of the anti-trust laws, all license fees paid to Ascap for the right to exhibit sound films containing musical compositions of its members, asserting that since the licenses were illegal Ascap was not entitled to collect license fees thereunder. The entire licensing practices of Ascap were held to violate the anti-trust laws and enjoined on the ground that the various owners of copyrights could not lawfully combine their copyrights, but recovery of the license fees was denied.

In rejecting the claim, Judge Leibell said:

> "* * * Plaintiffs can not recover unless they were led to pay 'more than the worth' of the performing rights. Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241. They must show that they were injured. Twin Ports Oil Co. v. Pure Oil Co., 8 Cir., 119 F. 2d 747; Northwestern Oil Co. v. Socony Vacuum Co., 7 Cir., 138 F. 2d 967.
>
> "To apply the principle of forfeiture plus a 200% penalty, for which plaintiffs in effect contend, would be to go far beyond any sanctions the Supreme Court has approved in a private right of action for a violation of the anti-trust laws. * * *
>
> "* * * The fact that the thing sold is something intangible, a right instead of merchandise, does not alter the requirement of the anti-trust laws that the plaintiff must show that he has been injured. The

> burden of proof is on plaintiff to show that part of his case by a fair preponderence of the evidence. * * * *A plaintiff does not satisfy that burden by offering no proof at all, except what he paid the violator*" (pp. 897-8).

None of the cases cited by petitioner involves a claim for treble damages based on illegal exaction. *Continental Wall Paper Co.* v. *Voight & Sons, supra,* involved a claim of illegality, because of anti-trust law violation, as a defense to an action to collect the purchase price of goods sold. In that case, as stated by this Court in *Wilder Mfg. Co.* v. *Corn Products Co., supra,* and *Bruce's Juices* v. *American Can Co., supra,* the contract sued on had as its object and effect accomplishment of illegal ends which the Court found would have been consummated by the judgment sought. Both plaintiff and defendant were parties to the illegal combination and under the principle there applied neither would have been permitted to invoke the aid of a court. This Court said:

> "* * * the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay.
>
> "In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans or was directly or indirectly a party thereto. Its interest must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law" (212 U. S. 262).

Obviously there is nothing in the foregoing to suggest that if the defendant had voluntarily paid, it could have recovered the amount as damages for anti-trust law violation or otherwise. The principles upon which the decision is rested clearly negative such a possibility. Petitioner does not contend that it was a participant in the unlawful conspiracy but that is an essential element of the *Wall Paper* case. Establishment of such a claim would of itself bar recovery.

In *Morton Salt Co.* v. *Suppiger,* 314 U. S. 488, it was held that since the plaintiff was attempting to extend its patent monopoly beyond the scope of the patent, it was contrary to public policy for a court of equity to lend its aid against an infringer. But that doctrine, as recognized by Judge Leibell in *Alden-Rochelle Inc.* v. *Ascap,* 80 F. Supp. 888-897, lends no support to the right of a licensee to recover as damages, amounts paid as royalties and license fees under agreements claimed to be illegal because of anti-trust law violation.

Certainly there is nothing in *Bruce's Juices* v. *American Can Company,* 330 U. S. 743, which supports the right to recover royalty and license fee payments as damages. This Court did, of course, recognize Bruce's right to maintain an action for damages for violation by the seller of the Robinson-Patman Act. But obviously the damages recoverable in such a case would not have been the agreed purchase price of the cans which he was held obligated to pay, but the damages for injury to his business and property suffered in that and other transactions by reason of the violation of the statute. Clearly, there is no implication that the collection of the agreed purchase price would itself constitute a violation of the anti-trust laws for which the seller

could be required to repay the amount collected, trebled. Petitioner in this case had a right to recover any damages it could show to have been sustained as a result of respondents' anti-trust law violation. Its difficulty is that it has been unable to make such a showing, as conclusively found by the District Court. The following language of this Court in the foregoing opinion is directly applicable to petitioner's claim here:

> *"It would seem that one test of the rationality and appropriateness of such a defense because of a violation of the Act would be that the reparation it permits should be measured at least roughly by the extent of the injury caused by the violation. This, of course, is the principle of the suit for triple damages. But that is not the principle of the defense here urged. The extent of its indemnity is not measured by injury, and not measured by the dealings affected with the alleged violation. It is measured solely by the amount of credit the buyer obtained from the seller.* The seller would lose the amount carried in notes or in open account. *Had Bruce's delinquency been greater, so would its gain;* had there been no credit asked or given the buyer could have had no remedy by way of defense. The obvious consequence would be to discourage vendors from extending credit where the operation of this rather difficult statute is in doubt. * * *
>
> *"This construction which would make a grant of credit a point of vulnerability could be avoided only by holding that the whole purchase price, not merely that involved in the credit, is uncollectible and recoverable even if voluntarily paid. In that case, the volume of the transaction, rather than the volume of the credit extended, would measure the loss a seller might suffer from violating the Act.*

> *"But, of course, if the discount system of the Can Company makes all of the Bruce purchases illegal and the price thereof recoverable, all sales to others under the discount system must be similarly tainted. It is hard to see how any of the Can Company's sales are valid if these to Bruce are void on the theory advanced. If this view is taken, certainly the remedy would soon end illegal quantity business discounts—by ending the business. We do not believe Congress has contemplated so deadly a remedy or has left the way open to us by judicial edict to dislocate business as such a holding would do. It must not be forgotten that such a decision would have retroactive effect for several years and unsettle many accounts. We cannot justify a judicial declaration to this effect"* (pp. 753, 754).

The measure of recovery sought here is equally unrelated to the extent of any injury suffered, but is measured solely by the amount paid regardless of the benefits received and retained, which would include not only the use of the machines but the service which the District Court held resulted in turning an unprofitable operation into substantial earnings, and with reference to which this Court said:

> "* * * Under this system Hartford rendered a service in the repair, maintenance and protection of the machines, which is valuable, if not essential, to the users * * *" (323 U. S. 409).

Chattanooga Foundry, etc. v. *Atlanta,* 203 U. S. 390 also cited by petitioner, did not involve a claim of illegal exaction. Recovery was sought and obtained for the difference between the price paid and the price which the buyer would have been required to pay except for the unlawful conspiracy.

Petitioner also seeks to support the recovery of license fees and royalties by a quotation of language appearing in the separate opinion of Justice Rutledge in the *Toledo* case. That case presented two questions with respect to royalties, (a) whether the *Toledo* decree requiring royalty-free licensing for the future should be sustained and (b) what disposition should be made of the royalties paid after the entry of the judgment of the District Court which had been required to be impounded by the receiver pending the final action of the Court.

While Justice Rutledge concurred in the opinion of the majority with respect to sustaining Judge Kloeb's findings of anti-trust law violation, he dissented from the majority as to the relief to be granted, including that as to royalty-free licenses and the disposition of the impounded royalties, and the quoted statement is a part of that dissent. But in any event no question was then before this Court, either as to the right to retain royalties previously paid, or as to the right to recover amounts so paid threefold as damages sustained by reason of anti-trust law violation.

The language of Justice Rutledge is repeated by Justice Douglas in a dissenting opinion in *U. S.* v. *National Lead Co.*, 332 U. S. 319, 367, but the only question involved there was that of future royalty-free licensing.

Regardless of the inherent legality or illegality of the licensing agreements, there is no basis in authority or principle for the contention that petitioner has made a case for the recovery of damages under the anti-trust laws by merely showing that it paid royalties and license fees pursuant thereto.

5. The Hartford-Owens Agreement.

One further contention is made by petitioner with respect to its right to recover license fees and royalties, which appears to be that its position is strengthened, in some undefined respect, because under the Hartford-Owens agreement of 1924, the payments made to Owens were measured by the payments of Hartford's licensees.

Under the terms of that agreement, Owens granted Hartford an exclusive license under its gob-feeding patents and patent applications which it then owned or might acquire prior to July 1, 1931. In return it obtained a non-exclusive license under all of Hartford's gob-feeding patents, the right to use 40 Hartford feeders and formers free of royalty up to $440,000 annually, and the right to one-half of Hartford's income from licensed inventions in excess of $600,000 per year. It is stipulated here that the result of this agreement was to enable manufacturers, including plaintiff, to procure from a single source (Hartford) a license under the gob-feeding patents of both Hartford and Owens and to make all the gob-feeding inventions of both companies available to Hartford licensees (Ex. 507, R. 1018).

There was neither any contention nor any finding in the Toledo case and there is no evidence or finding in this case, that the rights acquired by Hartford for its licensees, including petitioner, without additional cost to them, by the 1924 agreement were not fully worth what Hartford agreed to pay Owens or that Hartford could have acquired such rights for its licensees on any other basis. The primary objections to the agreement in the *Toledo* case were that it eliminated competition between the suction and gob fields

and that by Section 22 Owens retained the power to veto future licenses. Neither of these results could damage petitioner because it was already a licensee of Hartford and any policy which would limit the granting of additional licenses to its competitors would in fact inure to its benefit.

Manifestly the mere fact that a part of Hartford's income from licensed inventions was paid to Owens under that agreement does not improve petitioner's claim to recover its royalty and license fee payments as damages. The amounts paid by it to Hartford for royalty and license fees were not increased as a result of the Owens contract. Whether the payments which Hartford agreed to make for the license under the Owens patents were measured by a proportion of Hartford's income from its own patents, supplemented by its rights as a licensee under the Owens patents which inured to the benefit of petitioner, or in some other manner, was obviously immaterial as far as petitioner was concerned. Certainly it cannot be contended that except for the Owens contract petitioner would have obtained Hartford machines and services royalty-free.

With reference to the claimed competitive advantage of Owens as a result of the agreement, it must be remembered that Owens could already manufacture glass containers royalty-free by use of its own suction process. It had that competitive advantage prior to the 1924 agreement and would have continued to have it if the agreement had never been entered into. It might also have been able, had the agreement never been entered into, to use its patents to block the use of all gob-feeding mechanism by Hartford licensees, including petitioner, and retain the business of manufacturing containers for its own benefit and that of its suction licensees. It is beyond human ingenuity to deter-

mine what conditions would have existed in the industry except for the 1924 agreement. Cf. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216, 222.

But even if it be assumed that Owens did in fact obtain a competitive advantage, that alone does not establish injury to petitioner within the meaning of the anti-trust laws, in the absence of evidence that Owens made use of the advantage to divert business which petitioner would otherwise have obtained, or to force it to sell at lower prices than it would otherwise have received. Cf. *Interstate Com. Com.* v. *U. S.*, 289 U. S. 385; *Penn. R. Co.* v. *International Coal Co.*, 230 U. S. 184, 202-206.

No inference can be drawn from the petitioner's earnings that it sustained any injury because of the Owens contract. Its operation had not been profitable prior to its becoming a Hartford licensee in 1923 and its profits not only were not diminished but increased from 1924 on, after the Hartford-Owens contract was entered into, until late in 1929 (*supra*, p. 4). There is no finding that by reason of the 1924 agreement or otherwise the conspiracy adjudicated at Toledo functioned in any way in the last three months of 1929 or in 1930, which would differentiate its effect during that period from the prior years when petitioner was making profits. Petitioner's losses following the 1929 market crash were found to be attributable to causes for which respondents had no responsibility and over which they had no control (M. Fdg. 36, 37, R. 498, 507; Ct. Fdgs. 33, 34, R. 626, 629).

But in any event petitioner's claim is not based on damage claimed to have been sustained because of the Owens agreement but because of the disposition by Hartford of the amounts paid under its license agreements. No such

question is in any degree relevant to petitioner's right to recover as damages the amounts so paid to Hartford.

B. The Court of Appeals Correctly Construed Section 5 of the Clayton Act.

The contention that the Toledo judgment in and of itself established presumptively the fact of injury to petitioner, and that such presumption became conclusive because respondents rested at the close of petitioner's evidence, has no support in authority or legal reasoning. The argument by which it is sought to be supported consists of quoting the statute (15 U. S. C. 16), referring to the general adjudication of anti-trust law violation in the Toledo judgment, stating that petitioner was engaged in the business of manufacturing glass containers during the time the conspiracy was in progress, and pointing out that respondents rested at the close of petitioner's case. Needless to state, no case is cited even remotely supporting the claim.

Viewed in the light of the actual holdings in the *Toledo* case, the argument is even more extreme. As will be shown, in that case the Government pleaded and attempted to prove that the receivership and sale of petitioner's properties were steps in the conspiracy. The decision was against the Government. Now petitioner seeks to prove a fact by use of the judgment in a case where the decision was that the fact did not exist.

The argument assumes, without discussion, that by virtue of the statute, a Government judgment dispenses with the necessity of a plaintiff establishing causal connection between the violation and the damage and casts upon a defendant the burden of disproving such connection. That the burden is on a plaintiff to prove such causal con-

nection, see authorities cited in the Court of Appeals opinion (Pet. Br., p. 43). If petitioner's contention is correct, it means that a plaintiff can introduce a Government judgment in evidence, prove that he was engaged in the business with respect to which the judgment was entered at the time of the violation found, and rest his case. If no further evidence is introduced, judgment for the plaintiff must follow. How the amount of such a judgment could be computed is not suggested.

Applied to this case, the contention goes even further. Even though plaintiff introduces other evidence which has been found to show a lack of damage, judgment still must follow as a matter of law on petitioner's theory if the defendant rests without introducing evidence and a reviewing court must so find even in the absence from the record of the evidence actually introduced at the trial and in spite of findings below to the contrary.

Obviously the statute contains no language suggesting such a result. It merely provides that such a judgment is prima facie evidence in a suit between private litigants as to the matters respecting which the judgment or decree would constitute an estoppel in favor of the Government in the first case. The *Toledo* judgment is evidence in this case only by reason of and to the extent provided by the statute, but for which it would be inadmissible for any purpose. *Buckeye Power Co.* v. *duPont deNemours & Co.*, 248 U. S. 55, 63.

Any fact which under the ordinary principles of estoppel by judgment would be deemed established in favor of the Government in a second action between the Government and respondents would be prima facie established in this case but the estoppel could extend only to the issues actually and

necessarily litigated and determined in the original case, since a different right of recovery is involved. *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. Obviously the right of private individuals to recover damages is not an issue in a Government case.

It should be noted that petitioner does not attempt to point out any specific injury to it claimed to have been adjudicated in the *Toledo* case, but refers only to the adjudication of anti-trust law violation. That case did involve issues as to the responsibility of respondents for the failure of petitioner, but all were decided against the Government.

The complaint in the *Toledo* case contained allegations as to the Turner receivership and subsequent sale of its properties to General Glass (Toledo Printed Record 48-49) and these were claimed to have been in pursuance of the conspiracy (Toledo Record 86, 124). Anchor Hocking, the successor of Hocking, which had acquired first a half interest and then the entire interest in petitioner's property through General Glass, and Collins, Williams and Fulton, former directors of petitioner and directors of Anchor Hocking, were named as defendants. The evidence submitted by the Government encompassed substantially all the claims of injury to Turner stated in its complaint here. Hartley, Turner's president, testified for the Government.

At the close of the case, the Government tendered extensive findings, which if entered would have linked Turner's affairs and Anchor Hocking, Collins, et al., with the conspiracy. These were rejected by the trial court as to all defendants (Requested Findings 527-536, R. 564-6, Toledo Record, pp. 7038-40). The court also dismissed Anchor Hocking and Williams, but did hold Collins and Fulton as defendants.

In this Court, the Government sought to uphold the judgment against Collins and Fulton largely on the evidence as to their relations with Turner, urging the connection of the matters covered in the tendered findings with the conspiracy.

This Court unanimously reversed as to Collins and Fulton because of the refusal of findings requested by the Government and because of the failure of proof (See excerpts from this Court's opinion, *supra*, p. 9).

This clearly demonstrates the absurdity of the contention that the introduction of the *Toledo* judgment in this case presumptively established damage to petitioner.

The Court of Appeals properly construed the statute in holding that the introduction of the *Toledo* judgment was of no avail to petitioner unless it established that it sustained damage, and constituted no basis for disturbing the finding of the District Court to the contrary. The mere fact that petitioner asserts a construction of the statute, contrary to its plain language and to fundamental principles, which has not heretofore been considered worthy of assertion by any other litigant, does not create a necessity for its settlement by this Court.

C. The Contention That the Evidence Establishes Pecuniary Loss to Petitioner.

Petitioner's third contention, as stated under "Questions Presented" (p. 7-8) and "Assignment of Errors" (p. 21) appears to be a repetition of the claim of damage based on payment of royalties and the claim that the *Toledo* judgment established the fact of damage, combined with the loss of its properties through receivership and sale.

Since petitioner's argument of the contention (Br., p. 32-35) is limited to the effect of the loss of properties and since the royalty and *Toledo* judgment points have already been discussed, consideration will be given here only to the receivership and sale.

This contention was not even made in the Court of Appeals (see Amended Statement of Points, R. 2145), and could not have been considered if made, in view of the findings below and the absence of substantially all of the evidence on which such findings were based (*supra*, pp. 2-3).

The Master and the District Court concurrently found:

> "The corporate defendants while engaged in a violation of the United States anti-trust laws did not conspire to bring about Turner's failure or the appointment of said receiver for Turner * * *" (M. Fdg. 37, R. 533: Ct. Fdg. 34, R. 651).
>
> "No one or more of the corporate defendants while engaged in violating the United States anti-trust laws conspired to bring about, or caused, said receiver's sale to General Glass or caused this court to confirm said Receiver's sale (M. Fdg. 38, R. 539; Ct. Fdg. 35, R. 655).
>
> "The evidence herein does not establish that * * * anything done by any one or more of the seven corporate defendants in the instant case, while, engaged in violating the United States Anti-Trust laws, caused Turner's failure or the Turner receivership or brought about the Receiver's sale to General Glass or caused any other injury to Turner's business or property" (M. Fdg. 43, R. 567; Ct. Fdg. 39, R. 663).

These ultimate findings were supported by detailed evidentiary findings.

Petitioner does not even refer to any of these findings, and suggests no ground on which they can be disregarded here.

Even if they could be questioned in this Court, and the isolated matters referred to in the brief considered without reference to the omitted evidence, there would be no merit in the contention.

The assertion that petitioner was known as a price cutter (unsupported by the record) does not prove damage. The letter quoted at page 33 of petitioner's brief and Finding 605 from the *Toledo* case show only discussions of a possible merger of Turner and Thatcher, which was abandoned. The letter was an exhibit in the *Toledo* case (Ex. 846, folio 60141, not printed) and neither it nor Finding 605 resulted in a holding there that the Turner liquidation was connected with the conspiracy. On all the evidence below the Master made no finding in accord with Finding 605, although he did make detailed findings as to the Thatcher-Turner negotiations at the time (M. Fdg. 35, R. 495-6) as well as the receivership and sale (M. Fdgs. 37, 38, R. 507-539).

The facts that a receiver was appointed for petitioner at the suit of Hartford and its property sold to General Glass do not prove recoverable damage to petitioner. The claim that the receivership was an overt act rests only on petitioner's assertion contrary to the findings. *Columbia Gas & Electric Corp.* v. *U. S.*, 151 F. (2d) 461, has no bearing on the matter. It involved the status in a bankruptcy reorganization of claims of a stockholder and creditor who had wrongfully brought about the failure at a time when the bankrupt might have survived. Even if the holding was applicable to a damage suit, which it is not, it could not apply to the facts found in this case.

No question is presented for the consideration of this Court by the contention that petitioner sustained recoverable damage on account of the receivership and sale of its

property, considered either separately or in conjunction with other asserted claims.

D. The Contention That the Master Improperly Considered and Relied Upon Matters Outside of the Record.

Petitioner's last contention is that the Master improperly considered and relied on the rejection by the Toledo court of certain findings tendered by the Government in that case, which if accepted would have connected injury to petitioner with the conspiracy there adjudged. Complaint is made that these rejected findings were not introduced in evidence in this case.

Petitioner seems to assert at some places (Pet. p. 11, Br. p. 22) that the rejection of these findings was relied on in support of the Master's general finding that petitioner was not harmed by any act of respondents (M. Fdg. 43, R. 567). There is nothing in the record to so indicate. These rejected findings are set forth in Finding 40, relating entirely to the *Toledo* case and are prefaced only by the statement that they were not entered by the Toledo court (R. 564).

In any event, it was clearly a matter for the District Court in reviewing the Master's report to determine whether any improper consideration had been given to the rejected findings. The District Court, having before it all of the evidence presented to the Master, confirmed the result reached, but did not include in his own findings any reference to the rejected findings. What this Court is in effect asked to do, without such evidence before it, is to review the District Court's determination that no improper consideration had been given to such findings. There is nothing in the record to show what, if any, consideration the District Court gave to the rejection of the findings or to

this Court's statement as to their effect in reversing as to Collins and Fulton. The presumption is, of course, that no improper effect was given.

In the argument (Br., p. 35), it is asserted only that the Master improperly relied on the rejected findings in support of his conclusion that the Toledo court did not adjudge that respondents caused any injury to petitioner.

It was not only proper but necessary to examine the rejected findings in order to understand fully the reference of this Court to such findings in reversing as to Collins et al. (*supra*, p. 9). For this purpose it was immaterial whether they were offered in evidence. The record in another case may be looked to, to determine the holding in that case. *Oklahoma* v. *Texas*, 256 U. S. 70, 93; *Metropolitan Casualty Co.* v. *Stevens*, 312 U. S. 563, 566, footnote 3; *U. S.* v. *Flannery*, 268 U. S. 98, 103-4; *Atlantic Fruit Co.* v. *Red Cross Line*, 5 F. (2d) 218, 219 (2nd Cir. 1924).

No conclusion other than that reached by the Master as to whether the Toledo judgment adjudicated any injury to petitioner was possible in any event, regardless of any consideration of the rejected findings.

The petition is without merit and should be denied.

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